Supreme Court, U.S.
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No. 99-696

IN THE

Supreme Court of the United States

AMERICAN GRAIN TRIMMERS, INC., and
FRANK GATES-ACCLAIM,

Petitioners,

v.

OFFICE OF WORKERS' COMPENSATION PROGRAMS,
and MARIAN JANICH,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT MARIAN JANICH

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Now comes the Respondent, MARIAN JANICH by her attorneys, JOHN C. SANDS and ROBERT T. NEWMAN OF O'CONNOR, SCHIFF & MYERS and says that this Honorable Court should *not* grant a Writ of Certiorari to review the decision of the Seventh Circuit Court of Appeals in this matter.

INTRODUCTION

The Respondent Marian Janich respectfully argues that the petitioner American Grain Trimmers, Inc. has incorrectly phrased the "QUESTION PRESENTED".

THE "QUESTION PRESENTED" is *not* and has not been whether a properly framed opinion by a qualified physician with appropriate credentials constitutes "substantial evidence to the contrary" of the presumptions of Section 20 of the Longshoremen's and Harbor Workers' Compensation Act.

Instead, the question before the Administrative Law Judge, Benefits Review Board and Seventh Circuit Court of Appeals has been whether the opinion of Dr. Richard Carroll, the employer's expert witness had or had not been substantial evidence to rebut the widow Marian Janich's prima facie claim that her husband Paul Janich had suffered death arising out of and in the course of employment while at work on a grain dock at the Port of Chicago on August 12, 1992.

The Seventh Circuit Court of Appeals, the Benefits Review Board and Administrative Law Judge Robert Mahony all concluded that Dr. Carroll's testimony was not substantial evidence to rebut the presumption, and therefore to characterize his testimony as a "properly framed opinion" assumes a premise contrary to the results below.

STATUTES INVOLVED

Longshoremens' And Harbor Workers' Compensation Act:

33 U.S.C.A. § 909

> If the injury causes death, the compensation therefore shall be known as a death benefit and shall be payable in the amounts and to or for the benefit of the persons following:
>
> (a) reasonable funeral expenses not exceeding $3,000.00
>
> (b) If there be a widow . . . to such widow . . . 50 percentum of the average wages of the deceased . . .

33 U.S.C.A. § 920

> In any proceeding for enforcement of a claim under this Act, it shall be presumed in the absence of substantial evidence to the contrary
>
> (a) that the claim comes within the provisions of this Act

THE STATEMENT OF THE CASE

The statement of the case as presented in the Petition for a Writ of Certiorari is misleading as to the evidence of decedent Paul Janich's actions about 1:00 p.m. to 2:00 p.m. on the day of his death August 12, 1992 and as to the demanding nature of his job. (References are to the Appendix in the Petition for Certiorari.)

The Administrative Law Judge found that Paul Janich was the leader of a group of grain trimmers the day he died. He started at 8:00 a.m. It was a rainy day. They were working on a barge and finished it in the morning and worked loading another barge until a grain inspector stopped them, because the weather became bad, raining heavily. App. 49. Paul Janich ordered his men to come off the barge. App. 49. The barge had to be closed to prevent the grain from becoming wet, because wet grain spoils. App. 49.

Paul Janich collapsed and died immediately after giving the order, to his men, to come off the barge. App. 49.

There is an urgency to closing up the vessel when the rain becomes heavy to prevent the grain from being spoiled.

John Janich, another gang leader and the decedent's brother, explained that the process of loading barges with grain calls for the gang leader to supervise the loading of 44,000 to 60,000 bushels weighed 1,100 to 1,500 tons. App. 45. The gang leader is responsible for loading the barge without exceeding draft limits and so that the barge is balanced, with no listing to the inboard nor outboard nor bow nor stern. App. 45-46. There is difficulty in loading the barges without listing. App. 47.

The gang leader is responsible for the safety of his men. App. 47. This Summer of 1992 had been busy for grain trimmers in the Port of Chicago. App. 48.

Paul Janich himself had worked about 33 days out of 38 calender days from July 6, 1992 until August 12, 1992. App. 48.

One of claimant's theories is that working these 33 days had fatigued Mr. Paul Janich and the fatigue was a factor in the fatal heart attack. App. 52.

Claimant's further theory is that stress of having to stop the barge loading operation on an urgent basis on August 12, 1992 had precipitated the fatal heart attack. App. 52.

The claim is supported in this regard by testimony of Dr. Castor, claimant's Exhibit 20 that any time a person with a diseased heart does any strenuous activity then that can aggravate the condition of the diseased heart and a fatal heart rhythm disorder can be precipitated. App. 52-53.

This latter theory was specifically found creditable by the Administrative Law Judge Robert Mahony. App. 57-58.

Dr. Richard Carroll opined that Mr. Janich could have died of sudden cardiac death due to a loss of heart rhythm with no precipitating cause. App. 64.

Dr. Carroll opined as to the cause of death, given Mr. Janich's poor left ventricular function, coronary disease and history of arrhythmia, could have been sudden cardiac death, but what was the cause of death is speculative at best. Dr. Carroll's dep. pg. 23, App. 57.

Dr. Carroll testified he did not see anything in defense counsel's report of the activities of Mr. Janich to cause a fatal heart arrhythmia. App. 65.

But, Dr. Carroll admitted on direct and on cross examination that he really did not understand Mr. Janich's job duties. Dr. Carroll actually said this four times in the

deposition, at pages 27, 28, 32 and 50, and two of these are replicated in the appendix, at App. 65, 69.

Dr. Carroll testified he did not know whether Mr. Janich having worked 33 of 38 calender days immediately preceding his death had been a contributing cause of the death. App. 55, 57.

The Administrative Law Judge opined that since Dr. Carroll testified that the cause of Mr. Janich's death was speculative at best, then Dr. Carroll's opinion as to whether the work activity had or had not been a causative factor must also be speculative. The Administrative Law Judge went on to say that Dr. Carroll's opinion that Mr. Janich died of cardiac arrhythmia. is based largely on probabilities, the 50% mortality of patients with poor left ventricular function and that those who die "Often" do so as a result of arrhythmia. App. 57. The Administrative Law Judge also wrote

> Moreover Dr. Carroll's conclusion that the decedent's death is unrelated to work is undercut by his concession that he does not know if the cumulative effort of the amount decedent worked in the 38 days before his death could have been a precipitating cause of death.

App. 57.

There is an implied admission in this response that work could have been an aggravating factor that precipitated the death. If so, then granting workers' compensation benefits would be consistent with precedent, e.g. *Wheatley v. Adler*, 407 F.2d 307 (1968) (U.S. Court of Appeals for the District of Columbia Circuit).

The Benefit Review Board affirmed the Administrative Law Judge. App. 31-32.

The Seventh Circuit Court of Appeals ruled that the Administrative Law Judge simply found that Dr. Carroll's testimony was so hedged and speculative that it did not undercut the claimant's prima facie case. App. 14.

The Seventh Circuit Court of Appeals at page 14 of its opinion:

> True, Dr. Carroll said he was confident that Mr. Janich's occupation and work did not cause his death but the doctor also said in effect that he had no idea what work Mr. Janich was performing in the days and weeks leading up to his death.

App. 14.

The Court was correct. The witness Dr. Carroll admitted more than once that he did not understand Mr. Janich's work and responsibilities. If the doctor did not understand the decedent's job then he could not rationally rule out the job as a precipitating cause of a fatal heart rhythm disturbance.

Particularly since the decedent collapsed and died immediately after an urgent task — stopping the loading operation so the grain already in the barge would not be drenched, by the rain, and Mr. Janich was doing this activity on the waterfront in a bad weather situation, it is readily understood that the work activity could have been a precipitating cause of the death. The presumption of Section 20(a) should be invoked where, as here, the death occurred in the course of employment. *See Bell Helicopter International v. Jacobs*, 746 F.2d 1342 (8th Cir. 1984).

THE CASE AT BAR IS NOT A CASE IN WHICH A WRIT OF CERTIORARI SHOULD BE GRANTED UNDER SUPREME COURT RULE 10

A. Rule 10. Considerations Governing Review On Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) A United States Court of appeals has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) A state court of last resort has decided an important federal question in a way that conflicts with the decision of another state

> court of last resort or of a United States Court of Appeals;
>
> (c) A state court or a United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

APPLICATION OF RULE 10 TO THE CASE AT BAR

The Petition for Certiorari attempts to raise an argument that there is a conflict between the opinion of the Seventh Circuit Court of Appeals and a decision of the First Circuit Court of Appeals in *Bath Iron Works v. Director, O.W.C.P.*, 137 F.3d 673.

In that case the First Circuit articulated:

> . . . the presumption is overcome with substantial evidence of non-causation. See *Sprague* 688 F.2d at 865. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. This includes reasonable probabilities.

137 F.3d 673, 675.

In the case at bar the Seventh Circuit held that the employer's burden, once the claimant had made a prima facie case, is a burden of production of evidence.

By statute, the evidence to be produced by the employer must be substantial. The Seventh Circuit wrote that there are many phrases known to the law to describe how much evidence is substantial enough to justify a particular result, at page 12 of the Seventh Circuit opinion. App. 12.

The Seventh Circuit then quoted *Richardson v. Perales*, 402 U.S. 389 (1971) for the phrase "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

The Seventh Circuit also cited *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 at 507 (1993), for a formulation it found to be equivalent. There is a burden on an employer in an employment discrimination case to produce through admissible evidence, "reasons for its actions which if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action"

The Seventh Circuit Court of Appeals also cited *Stedman v. SEC*, 450 U.S. 91, for a proposition that substantial evidence also denotes quantity. A decision based on substantial evidence requires a quantity of evidence in support. App. 12.

The First Circuit opinion in *Bath Iron Works* does not conflict with the case at bar on the topic of what constitutes substantial evidence to rebut the presumption of 33 U.S.C. § 920(a).

Instead, these Circuits agree on the formulation and definition of what constitutes substantial evidence.

The Seventh Circuit followed United States Supreme Court precedent in its definition and explanation of what constitutes substantial evidence. In fact the Seventh Circuit in the case at bar and the First Circuit in the *Bath Iron Works* case both cited and followed the same precedent, from the First Circuit *Sprague v. Director, OWCP*, 688 F.2d 862, 865 (1982).

The *Bath Iron Works* precedent was different on its facts and the procedural history of the case from the case at bar.

In *Bath Iron Works*, the employer's expert physician had a specific reason for denying that the claimant's cancer had been caused by occupation exposure to asbestos. The reason was x-ray evidence that showed the claimant had cancer but not fibrosis. Cancer without fibrosis was consistent with cigarette induced cancer. If asbestos exposure had been a causative factor, fibrosis would have been apparent on an x-ray. The Administrative Law Judge had adopted the opinion of the employer's expert.

In the case at bar, the employer's expert did not have a substantial rationale for his opinion, because he admitted he did not understand the decedent's job responsibilities, did not really know the cause of death, did not know whether the cumulative effect of decedent's work over 33 days had been a causative factor in the death.

The Administrative Law Judge as finder of fact has determined that the employer's expert did not present substantial evidence to rebut the presumption that the claim comes within the requirements of the Act.

So the First and Seventh Circuits agreed on the meaning of "substantial evidence to rebut the presumption" but came to different results because the facts of the two cases are different, and because the Administrative Law Judge in *Bath Iron Works* ruled against the claim, but in the case at bar the Administrative Law Judge ruled in favor of the claim.

That substantial evidence is such as a reasonable mind would accept as reasonable to support a determination, is a formulation that has been adopted by several of the Circuit Courts of Appeal.

These formulae are consistent with a line of precedent cases including *DelVecchio v. Bowers*, 296 U.S. 280, 286, 287.

These line of cases has been developed by the District of Columbia in *Swinton v. J. Frank Kelly*, 554 F.2d 1075 (1976) in which it was written that substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. 554 F.2d 1075 at 1083 and it was stated,

> stated otherwise, the presumption may be developed by circumstantial evidence specific and comprehensive enough to sever the potential connection between a particular injury and the job related event

554 F.2d 1075 at 1083.

And similarly this formula has been expressed in *Hensley v. Washington Metropolitan Transport Authority*, 655 F.2d 264, 267 (1981), and *Brown v. Continental Baking*, 921 F.2d 289, 295 (1980).

In *Universal Maintenance Corp. v. Moore*, 126 F.3d 256, 262 (4th Cir. 1997) the Court stated that when the presumption has been raised, then if the employer offers "evidence sufficient to justify a denial of the claim", the presumption drops out of the case.

The definition of substantial evidence used by the Seventh Circuit in this case is similar to that used by the United States Supreme Court, and other Circuit Courts of Appeal.

Administrative Law Judge Mahony applied an analysis that the claimant must make a prima facie case; then the Section 20 presumption is invoked; then the burden shifts to the employer to produce substantial evidence to rebut the presumption. If the presumption is rebutted then the case is analyzed to determine which party has the preponderance of the evidence. App. 36 Footnote 2.

In his reconsideration decision the Administrative Law Judge recited this formula, then on the next page showed that in a precedent case called the *Kubin* case the Benefits Review Board wrote that the burden of proof transferred to the employer. App. 38

The transfer of the burden of proof as distinguished from a burden of production is a standard that Administrative Law Judge Mahony himself had not applied to the employer in this matter.

There was no substantive error by the Administrative Law Judge.

An argument made in the Petition for Certiorari that the employer's burden to rebut the presumption is to produce a

"minimum quantity of evidence, nothing more" is contrary to the statutory requirement that the evidence to rebut the presumption must be substantial. An argument presented within the Petition for Certiorari seems to be that in the phrase "substantial evidence", the word "substantial" refers only to quantity not quality of evidence.

In other words, according to the argument in the Petition for Certiorari, a large quantity of obvious lies or nonsense could be substantial evidence. This is not a valid argument. Substantial evidence has to have some quality and some quantity, sufficient to allow a reasonable mind to accept this evidence as sufficient to support a conclusion.

If a quantum of evidence had no quality at all — then no reasonable person could make a decision based on that evidence.

The dispute in this case is about factual findings or misapplication of a correctly stated rule of law. Therefore under Supreme Court Rule 10, this is not a case on which a writ of certiorari should be granted.

The claimant below presented evidence based on the eyewitness testimony of Herrera and Castillo that Paul Janich had been in charge of loading a barge with grain, when rain started to come down heavily. Paul Janich had to give orders to close down the operation, promptly, to avoid soaking the grain that had just been loaded. Immediately he collapsed and died on the scene. Dr. Castor and Dr. Greenberg presented evidence from which it can reasonably be judged, that the employment precipitated the fatal heart attack. This matter has been correctly decided by the Seventh Circuit, Benefits Review Board, and Administrative Law Judge.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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